IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT BURKE	:	CRIMINAL ACTION
	:	NO. 92-268
v.	:	
	:	CIVIL ACTION
UNITED STATES OF AMERICA	:	NO. 96-3249

Memorandum and Order

YOHN, J. October ___, 2005

Defendant Robert Burke has filed a *Hazel-Atlas* Action for Relief from Order Denying Section 2255 Motion ("*Hazel-Atlas* Action"). Burke seeks relief from this court's judgments in both his trial and collateral proceedings, arguing that they were based on fraud upon the court. Burke's *Hazel-Atlas* Action will be denied because it does not present clear, unequivocal, and convincing evidence that fraud was perpetrated upon the court by an officer of the court.

I. Factual and Procedural History

A jury found Robert Burke guilty of the murder of Donna Willard, a federal witness, and of related charges on August 26, 1993. At trial he was represented by A. Charles Peruto, Sr., Esq. On December 1, 1993, Burke was sentenced to life in prison, as well as to terms of 60 and 120 months running concurrently with his life sentence. Burke appealed his conviction and sentence to the Third Circuit, which affirmed on July 20, 1994. On appeal he was represented by

James West, Esq., of Sprague & Sprague. The Supreme Court denied his petition for certiorari on January 17, 1995.

Burke then filed a motion under 28 U.S.C. § 2255 on April 25, 1996, claiming that his trial counsel was ineffective for several reasons, including: 1) he failed to call certain witnesses, 2) he failed to move for sequestration of the jury, 3) he failed to introduce an answering machine tape recording of a message directed to Burke and in a voice recognized as that of James Louie, one of Burke's co-conspirators, and 4) he suffered from an alleged conflict of interest. This court denied Burke's § 2255 motion on November 8, 1996. I found that Burke's counsel's decision not to call certain witnesses at trial and to decline to move for sequestration of the jury represented reasonable tactical decisions. I also found that Burke's lawyer did not suffer from a conflict of interest and that Louie was so thoroughly cross-examined at trial that the omission of the answering machine tape did not prejudice Burke. *See Burke v. United States*, 1996 WL 648452 (E.D. Pa. Nov. 8, 1996). The Third Circuit affirmed on November 19, 1997.

Burke then filed a second collateral attack on his conviction in January of 1999, characterizing it as an "Independent Action for Relief from the Judgment in a Criminal Case or, in the Alternative for Relief from the Order Denying the Section 2255 Motion." He alleged that his judgment was tainted by the perpetration of fraud on the court and that he was constructively denied counsel because of what he perceived to be improper jury instructions. Burke raised three bases for his claim that the prosecution defrauded the court: 1) the prosecution told the jury that the government would recommend a sentence of twenty-five years for a cooperating witness, James Louie, when, in fact, it "recommended" a sentence of less than twenty-five years; 2) the prosecution failed to play an answering machine tape that called into question the prosecutor's

contention that Louie was afraid of Burke; and 3) the prosecution "corrected" inconsistencies in Louie's testimony concerning the location of an ATM withdrawal. I denied Burke's independent action on November 23, 1999, finding that it was the functional equivalent of a habeas petition that had not been certified by the court of appeals as required by The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Examining the merits, I held that even if I accepted as true his allegations of fraud, they did not amount to the requisite grave miscarriage of justice. I also found that the jury instructions were not faulty. *See Burke v. United States*, 1999 WL 1065217 (E.D. Pa. Nov. 23, 1999). The Third Circuit affirmed in May of 2001.

In January of 2005 Burke filed his *Hazel-Atlas* Action. In support of his *Hazel-Atlas* Action, Burke presented "new evidence," in the form of statements from four individuals. Burke argues that these statements show that the government presented James Louie and James Gray as truthful witnesses even though it knew or should have known that their testimony was false. The statements come from John Foley, the man who procured the services of Donna Willard's shooter at Louie's request; Nick Vasiliades, a cell mate of witness James Gray; Walter Kates, a prison acquaintance of James Louie; and Anthony Cimino, a participant in Burke's underlying insurance fraud scheme that precipitated the murder.

Foley was interviewed by an investigator on October 6, 2004 and signed a transcript of the statement on October 19, 2004. In the statement, Foley opines that Louie had both the motive and means to kill Willard himself. He also states that Louie never told him that Burke was involved in the murder.[1] Foley further discusses two phone calls that he made to Louie, at the

[1] While Foley states that "Louie told me that Burke was never involved in the murder," (App. B. to Def.'s *Hazel-Atlas* Action 43), on two other occasions he does describe Louie as implicating Burke. First, he describes a telephone conversation Louie said that he had with

behest of the FBI, in which he attempted (and failed) to induce Louie to incriminate Burke.[2] Finally, Foley states that he shared this information with federal investigators before Burke's trial.

Vasiliades provided a written statement dated November 6, 2001. In the statement, Vasiliades explains that while in prison he spoke to James Gray, a jailhouse informant who later testified at Burke's trial that Burke confessed to him. Vasiliades states that Gray believed he would be rewarded for implicating Burke and planned to pretend that Burke confessed to him to take advantage of those rewards. Finally, Vasiliades states that he gave this information to Burke himself during Burke's trial but not to the government.

Kates provided a written statement dated October 9, 2002. Kates states that he met Louie in prison, where Louie told him that the federal government wanted him to "lie in court and say that [Burke] did something which [Louie] knew he did not do." (App. D. to Def.'s *Hazel-Atlas* Action 3.) Kates also states that around this time he met Burke in a different prison, and shared this information with Burke before Burke's trial and gave a statement to Burke's investigator.

Cimino provided a typewritten statement dated December 18, 2002, in which he explains that one of the federal prosecutors told his attorney that Louie planned to kill Cimino as well.

Burke now requests that this court reverse his criminal conviction or vacate the order denying his § 2255 motion. I will deny Burke's *Hazel-Atlas* Action because I find that it fails to

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Burke, in which Louie received orders for the murder to occur that night. (*Id.* at 14, 18.) Second, Foley recounts a promise from Louie that "Burke [would] pay big time" for their services. (*Id.* at 19.)

[2] During Burke's trial, Louie was cross-examined about the exculpatory comments (about Burke) that he made to Foley during their telephone conversations.

present clear, unequivocal, and convincing evidence that fraud was perpetrated upon the court by an officer of the court.

II. Legal Standard

All courts have the inherent equitable power to vacate a judgment that has been obtained through the commission of fraud upon the court. *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946). However, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

Almost all of the principles that govern a claim of fraud on the court find their genesis in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) [hereinafter *Hazel-Atlas*]. In *Hazel-Atlas*, an attorney for Hartford wrote an article praising a Hartford product as an advance in the field, and arranged to have the article printed in a trade journal under the name of an ostensibly disinterested expert. *Id.* at 240. The Patent Office and the Third Circuit relied in part on this article in ruling in favor of Hartford in patent application and patent infringement cases. *Id*. at 240-41. The Supreme Court found conclusive evidence that this article was used for fraudulent purposes, and in granting relief to Hazel-Atlas explained that "[f]rom the beginning there has existed . . . a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." *Id.* at 244. The Court further noted that:

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Proof of the scheme, and of its complete success up to date, is conclusive.

Id. at 245-46 (internal citation omitted).

Federal Rules of Civil Procedure Rule 60(b) contains a savings clause that specifically provides for the continuing existence of this equitable power outside and independent of that rule.[3] *See generally* Charles Alan Wright et al., *Federal Practice and Procedure* § 2870 (2d ed. 1995). There is no statute of limitations for bringing a fraud upon the court claim. *Hazel-Atlas*, 322 U.S. at 244. As a circuit court has explained, "a decision produced by fraud on the court is not in essence a decision at all and never becomes final." *Kenner v. Comm'r of Internal Revenue*, 387 F.2d 689, 691 (7th Cir. 1968).

While Rule 60(b) may advert to the existence of the court's power to set aside a decision when fraud has been perpetrated against it, that power exists independently of 60(b). As the Third Circuit has stated, in describing a fraud on the court action: "Initially, we must be clear that we are not here reviewing a Rule 60(b) motion. . . . It follows that an independent action alleging fraud upon the court is completely distinct from a motion under Rule 60(b)."[4] *Herring v. United*

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[3] The provision of Rule 60(b) commonly known as the "savings clause" states: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court."

The fraud upon the court described in the savings clause is distinct from the fraud described in Rule 60(b)(3), the latter of which allows a court to relieve a party of a judgment upon the showing of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3) is subject to a one-year period of limitation.

[4] The Sixth Circuit has argued that there is a difference between an independent action and an action for fraud upon the court. *See 2300 Elm Hill Pike, Inc. v. Orlando Residence, Ltd.*, 168 F.3d 490, 1998 WL 808217, at *2 n.1 (6th Cir. 1998) (unpublished) ("Note that the issue of fraud on the court is a separate issue from an independent action in equity. The issues are frequently confused by the courts."). Because Burke's claims rely on *Hazel-Atlas*, which is the classic articulation of the fraud on the court doctrine, I will focus on that doctrine. Nonetheless,

States, 424 F.3d 384 (3d Cir. 2005) (internal citation omitted).

A fraud upon the court action must satisfy a very demanding standard to justify upsetting the finality of the challenged judgment. The Third Circuit has described the standard as follows:

> In order to meet the necessarily demanding standard for proof of fraud upon the court we conclude that there must be: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court. We further conclude that a determination of fraud on the court may be justified only by "the most egregious misconduct directed to the court itself," and that it "must be supported by clear, unequivocal and convincing evidence."

Id. at 386-87 (internal footnote and citation omitted). The court further ruled that "the fraud on the court must constitute 'egregious misconduct . . . such as bribery of a judge or jury or fabrication of evidence by counsel,'" *id.* at 390 (citation omitted), and that "perjury by a witness is not enough to constitute fraud upon the court," *id.* This is consistent with *Hazel-Atlas*, which noted that its facts presented "not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." 322 U.S. at 245. Rather, the court found "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.*

III. Discussion

Burke challenges this court's judgments in both his trial and collateral proceedings, alleging that he has "new evidence" that shows that those judgments were the product of fraud upon the court. However, even accepting all of Burke's evidence as credible, Burke fails to demonstrate by clear, unequivocal, and convincing evidence that fraud was perpetrated upon the

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the two actions share the characteristics of being equitable remedies reserved to the courts by Rule 60(b), and are often discussed in conjunction.

court by an officer of the court. Accordingly, I will deny Burke's *Hazel-Atlas* Action.[5]

First of all, Burke's *Hazel-Atlas* Action fails because it does not properly attribute the fraud that it alleges[6] to an officer of the court, as required by *Herring*, 424 F.3d at 386. While *Herring* did not specifically delineate the officials that fall within the officer of the court rubric, it did make clear that lawyers are included. *Id.* at 390. Overall, it seems that only individuals who are intimately associated with the operation of the court may be recognized as officers of the court. *See Cammer v. United States*, 350 U.S. 399, 405 (1956) (noting that officer of the court, "within the ordinary meaning of that term" describes only "marshals, bailiffs, court clerks [and]

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[5] In addition to arguing that Burke fails to show fraud upon the court, the government also argues that Burke's *Hazel-Atlas* Action is the functional equivalent of a habeas petition to which the procedures prescribed by AEDPA should apply. The government notes that Burke has previously filed two habeas petitions with this court, yet has not sought authorization from the Third Circuit to file this *Hazel-Atlas* Action, as AEDPA requires for successive habeas petitions. Thus, the government argues, this court does not have jurisdiction to consider Burke's action. However, in *In re Weatherwax*, No. 99-3550 (3d Cir. Oct. 21, 1999), the Third Circuit explained that "Petitioner's motion seeks relief from judgment based on a fraud on the court under *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 332 U.S. 238 (1944), and as such, is not a second or successive section 2255 motion." The same rule applies to this case: because Burke's action seeks relief based on a fraud upon the court claim, it is distinct from a habeas petition and is not governed by AEDPA. Accordingly, this court does have jurisdiction to rule upon Burke's *Hazel-Atlas* Action.

[6] It is unclear whether Burke's allegations of fraud upon the court are directed toward his initial trial or collateral proceedings. However, his allegations appear relevant only to his initial trial (despite the fact that the title of his action refers only to the collateral proceeding). His initial trial is where the disputed testimony of Louie and Gray was offered and evaluated, and where it impacted his case. His collateral proceedings, on the other hand, dealt with issues independent of Louie's and Gray's testimony. In Burke's § 2255 petition, he presented ineffective assistance of counsel claims, which were resolved by determining whether his lawyer had a reasonable tactical purpose in making decisions regarding the representation. This inquiry is distinct from the disputed testimony, and did not rely on that testimony at all. Similarly, in Burke's second collateral proceeding, he alleged fraud upon the court based on certain actions of the prosecution. Again, this court's decision to dismiss those claims was made without reliance on Louie's and Gray's testimony. Thus, it seems that Burke must be alleging that the fraud occurred in reference to his original proceeding.

judges").

While Burke appears to allege that the federal prosecutor fabricated evidence by inducing Louie and Gray to proffer false testimony at Burke's trial, of the four statements that he presented to support this claim, only Kates's alleges any wrongdoing by the government. The other three statements solely seek to impugn the credibility of government witnesses Louie and Gray.[7] Because *Herring* requires evidence that an officer of the court fabricated evidence, the statements of Foley, Vasiliades, and Cimino are of no use to Burke's fraud upon the court claim.

Even Kates's statement, which does tangentially accuse the government of misconduct, fails to adequately ascribe the misconduct to an officer of the court and merely recites what he says Louie told him. Kates's statement offers only the vague accusation that Louie said fraud was committed by "the feds." The designation "the feds" could refer to any number of individuals within the federal law enforcement network, many of whom are not officers of the court. Kates's indefinite and imprecise hearsay accusation is contrasted by *Herring*, where the party alleging fraud upon the court specifically identified and accused two government lawyers of committing the fraud. *Id.* at 390. Thus, Burke's *Hazel-Atlas* Action will be denied because it does not adequately demonstrate that the alleged fraud was committed by an officer of the court.

Not only does Kates's statement fail to properly identify an officer of the court, it also fails to present compelling evidence that the alleged fraud actually occurred. While Kates's

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[7] Foley's statement attacks Louie's credibility, a task that Burke's lawyer already fastidiously completed at the trial, *see Burke*, 1999 WL 1065217 at *3 n.5 (listing fifteen different avenues of impeachment that Burke's counsel pursued at trial), but does not allege that the government fabricated evidence. Vasiliades's statement suffers from a similar failing: it also fails to assert any wrongdoing by the government, and at most alleges that Gray was guilty of perjury. Finally, Cimino's statement is irrelevant to a fraud upon the court action; the fact that Louie wanted to kill Cimino has no relation to a charge that the government fabricated evidence.

statement does allege that Louie alleged governmental misconduct, it only does so through second-hand, unsupported allegations. The statement does not come from Louie, the individual who is alleged to have offered the fabricated testimony. Nor does it come from the government, the party that Burke accuses of orchestrating the allegedly fraudulent scheme. Instead, the evidence comes from Kates, a prison acquaintance of Louie, and recounts jailhouse conversations that occurred over twelve years ago. The speculative nature of this evidence is contrasted by *Hazel-Atlas*, where Hartford "never questioned the accuracy of the various documents which indisputably show[ed] [its] fraud." 322 U.S. at 250 n.5.

Finally, the inconsequential nature of this claim is emphasized by Burke's decision to present it, for the first time, at this late stage of his proceedings. Kates states that he shared this information with Burke and was interviewed by Burke's investigator before Burke's trial. Thus, if there really was a danger of fraud upon the court, Burke should (and presumably would) have pressed the issue at his trial or in one of his two previous collateral proceedings.

Overall, Burke's evidence that fraud was committed upon the court, by an officer of the court, is too inappreciable and attenuated to be clear, convincing, and unequivocal; thus, Burke's action does not satisfy the difficult standard required to upset the finality of a judgment. *See Herring*, 424 F.3d at 386 (noting that "[t]he presumption against the reopening of a case that has . . . reached final judgment must be not just a high hurdle to climb but a steep cliff-face to scale"). Accordingly, Burke's *Hazel-Atlas* Action will be denied.

An appropriate order follows.

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UNITED STATES OF AMERICA	:	NO. 96-3249

Order

Yohn, J.

AND NOW, this ____ day of October, 2005, upon consideration of defendant Robert Burke's *Hazel-Atlas* Action for Relief from Order Denying Section 2255 Motion (Doc. No. 171), the government's Response, and Burke's Traverse, IT IS HEREBY ORDERED that the *Hazel-Atlas* Action For Relief is DENIED and DISMISSED.

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William H. Yohn, Jr., Judge